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No. 718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO THE SOLICITOR GENERAL'S MEMORANDUM IN OPPOSITION.

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In their petition for rehearing, petitioners stated that they "have cause to believe that Government agents may have engaged in unconstitutional wiretapping and eavesdropping in connection with their case" (p. 1).[1] The Solicitor General, after being requested to file a response to that petition, says that he "is advised that this department has no information indicating that these petitioners were at any time the subject of wiretapping or eavesdropping" (p. 2). The Solicitor General does not say, however, who has so "advised" him and on the basis of how extensive an investigation. Did his advisor simply look at the Justice

1. The sources of this belief were detailed in Appendix A to the petition.

Department file and conclude that "this Department has no information indicating" such activity? Did he simply ask someone in the Federal Bureau of Investigation? Or did he conduct an independent and thorough investigation of his own?[2]

There is some disturbing evidence that those who engage in wiretapping and eavesdropping sometimes conceal this information from their superiors in the Department of Justice.[3] In light of this, petitioners cannot be satisfied, nor should this Court be satisfied, that what the Solicitor General has been "advised," is necessarily an entirely accurate and complete reflection of the real situation. Accordingly, this Court should remand the case to the District Court for a judicial hearing to determine whether the government did, in fact, engage in any proscribed wiretapping or eavesdropping. Such a hearing will subject the Department's ex parte determination of "no information" to the truth-testing aspects of an adversary process.

In *Kolod* v. *United States*, 36 L. W. 3306, the Solicitor General made an ex parte determination that certain information "was not arguably relevant to that prosecution." This Court held, however, that "we cannot accept the

2. The promptness with which the Solicitor General filed his Memorandum in Opposition is enough to raise some question about the extent of the investigation. Moreover, the Solicitor General's Memorandum was filed before this Court's decision in the *Kolod* case, see note 2 *infra*.

3. See Petition for Rehearing and Motion for Disclosure of Electronic Surveillance in *Kolod, Alderman and Alderisio* v. *United States*, granted on Jan. 29, 1968, 36 L. W. 3306. That petition cites evidence that "clearly reveals that the Department may have trouble getting its own agents to own up to illegality" (p. 10, note 5 and Appendix A). Among the materials cited were the *Nesline* case which "uncovered a large-scale FBI effort to conceal from government counsel and the courts the existence and nature of electronic surveillance in federal criminal cases," see *id.* at 2a-3a. The petition also cited the *McGarry* case (p. 3A) in which a government agent apparently erased tapes and misinformed his superiors in an attempt to conceal wiretapping.

Department's ex parte determination of relevancy in lieu of such determination in an adversary proceeding in the District Court." *Id.* at 3307. How then can this Court "accept the Department's ex parte determination" that the "Solicitor General is advised that this Department has no information indicating that these petitioners were at any time the subject of wiretapping or eavesdropping." Indeed, the Solicitor General, being an experienced lawyer, but not an experienced investigator, is in a much better position to determine whether an existing item of evidence is or is not "arguably relevant," than he is to determine whether certain evidence does or does not exist.

Further, the "Memorandum in Opposition" is limited to whether there was wiretapping or eavesdropping of which "these petitioners were . . . the subject . . ." (p. 2). The investigation (relating to one bank and four savings and loan associations) plainly involved more than "these petitioners," for there were two additional persons indicted: S. Lawrence Kahn and Thomas Joyce and two more persons named as conspirators, but not as defendants, Ferrari and Burleson. We are not told whether any of the six (except "these petitioners") were "the subject of wiretapping or eavesdropping" though such occurrences might well affect these petitioners just as surely as if petitioners were "the subject" aimed at by any placement of an electronic device.

In *Hoffa* v. *United States*, 387 U. S. 231 (1967), this Court learned that the government had overheard a conversation between one of the defendants [Burris] and a third party. The Solicitor General advised the Court that the recording was only "peripherally relevant to the charges underlying [Burris'] conviction," and he urged the Court to limit any inquiry to the effect of the wiretapping on that defendant alone. But the Court said: "We consider it more appropriate that each of these petitioners be provided an oppor-

tunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction." *Id.* at 233. Accordingly, this Court should not be satisfied with a statement that "these petitioners were not the subject of wiretapping or eavesdropping."

Petitioners respectfully request this Court, therefore, to grant the petitions for rehearing and for certiorari, "vacate the judgment of the Court of Appeals, and remand the case to the District Court for a hearing, findings and conclusions," see *Kolod* v. *United States, ibid.*, as to whether any proscribed wiretapping or eavesdropping did, in fact, occur.

Respectfully submitted,

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